

ROBERT LLOYD BUTTERFIELD,)	
)	
Petitioner,)	3:06-cv-00632-LRH-VPC
)	
vs.)	
)	<u>ORDER</u>
DIRECTOR, NEVADA DEPARTMENT)	
OF CORRECTIONS, <i>et al.</i> ,)	
)	
Respondents.)	
	/	

I. Procedural History

¹ The exhibits referenced in this order are found in the Court's record at Docket #11.

1 On February 17, 2004, an information was filed in the Eighth Judicial District Court for the
2 State of Nevada, charging petitioner with five counts of sexual assault upon a minor and four counts
3 of lewdness with a minor. (Exhibit 3). Petitioner was arraigned on March 2, 2004.

4 On November 2, 2004, petitioner changed his plea to guilty, pursuant to *North Carolina v.*
5 *Alford*, 400 U.S. 25, 91 (1970). (Exhibit 7). An amended information was filed on November 2,
6 2004, charging petitioner with two counts of sexual assault with a minor under sixteen years of age
7 (Counts 1 and 2) and one count of attempted sexual assault with a minor under fourteen years of age
8 (Count 3). (Exhibit 8). Petitioner signed a plea agreement, pleading guilty to Counts 1, 2, and 3,
9 which was filed on the same date, November 2, 2004. (Exhibit 9). On January 6, 2005, petitioner
10 was sentenced to the following: On Count 1, to a minimum of 5 years and maximum of 20 years in
11 the Nevada Department of Corrections; on Count 2, to a minimum of 5 years and a maximum of 20
12 years in the Nevada Department of Corrections, consecutive to Count 1; and on Count 3, to a
13 minimum of 96 months and a maximum of 240 months in the Nevada Department of Corrections,
14 consecutive to Count 1. Petitioner was granted 373 days credit for time served. (Exhibit 10).
15 Petitioner was assessed a \$25.00 administrative assessment fee and a \$150.00 DNA analysis fee.
16 (*Id.*). Petitioner was ordered to register as a sex offender and was given Lifetime Supervision to
17 commence upon his release from any term of probation, parole, or imprisonment. (*Id.*). The
18 judgment of conviction was entered on January 14, 2005. (Exhibit 11).

19 On February 14, 2005, petitioner filed a notice of appeal. (Exhibit 12). On July 29, 2005, the
20 Nevada Supreme Court filed its order of affirmance. (Exhibit 14).

21 On April 14, 2006, petitioner filed a post-conviction habeas petition in state district court.
22 (Exhibit 16). On July 5, 2006, the state district court entered a written order denying petitioner's
23 state habeas petition. (Exhibit 19). Petitioner appealed from the denial of his state habeas petition.
24 On September 20, 2006, the Nevada Supreme Court entered its order of affirmance. (Exhibit 20).

25 Petitioner dispatched the instant federal habeas petition on November 13, 2006. The Court
26 received the petition on November 16, 2006. (Docket #1-1, 1-2). Petitioner raises four grounds for
27 relief in his federal petition. (*Id.*).
28

1 Respondents have filed an answer to the petition, and petitioner has filed a reply brief. The
2 matter is ripe for decision on the merits.

3 **II. Federal Habeas Corpus Standards**

4 The Antiterrorism and Effective Death Penalty Act (“AEDPA”), at 28 U.S.C. § 2254(d),
5 provides the legal standard for the Court’s consideration of this habeas petition:

6 An application for a writ of habeas corpus on behalf of a person in
7 custody pursuant to the judgment of a State court shall not be granted
8 with respect to any claim that was adjudicated on the merits in State
9 court proceedings unless the adjudication of the claim –

10 (1) resulted in a decision that was contrary to, or involved an
11 unreasonable application of, clearly established Federal law, as
12 determined by the Supreme Court of the United States; or

13 (2) resulted in a decision that was based on an unreasonable
14 determination of the facts in light of the evidence presented in the
15 State court proceeding.

16 The AEDPA “modified a federal habeas court’s role in reviewing state prisoner applications
17 in order to prevent federal habeas ‘retrials’ and to ensure that state-court convictions are given effect
18 to the extent possible under law.” *Bell v. Cone*, 535 U.S. 685, 693-694 (2002). A state court
19 decision is contrary to clearly established Supreme Court precedent, within the meaning of 28 U.S.C.
20 § 2254, “if the state court applies a rule that contradicts the governing law set forth in [the Supreme
21 Court’s] cases” or “if the state court confronts a set of facts that are materially indistinguishable from
22 a decision of [the Supreme Court] and nevertheless arrives at a result different from [the Supreme
23 Court’s] precedent.” *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003) (quoting *Williams v. Taylor*, 529
24 U.S. 362, 405-406 (2000) and citing *Bell v. Cone*, 535 U.S. 685, 694 (2002)).

25 A state court decision is an unreasonable application of clearly established Supreme Court
26 precedent, within the meaning of 28 U.S.C. § 2254(d), “if the state court identifies the correct
27 governing legal principle from [the Supreme Court’s] decisions but unreasonably applies that
28 principle to the facts of the prisoner’s case.” *Lockyer v. Andrade*, 538 U.S. at 75 (quoting *Williams*,
529 U.S. at 413). The “unreasonable application” clause requires the state court decision to be more
than merely incorrect or erroneous; the state court’s application of clearly established federal law

1 must be objectively unreasonable. *Id.* (quoting *Williams*, 529 U.S. at 409). In determining whether a
2 state court decision is contrary to, or an unreasonable application of federal law, this Court looks to
3 the state courts' last reasoned decision. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991);
4 *Shackleford v. Hubbard*, 234 F.3d 1072, 1079 n.2 (9th Cir. 2000), *cert. denied*, 534 U.S. 944 (2001).

5 Moreover, "a determination of a factual issue made by a State court shall be presumed to be
6 correct," and the petitioner "shall have the burden of rebutting the presumption of correctness by
7 clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

8 **III. Discussion**

9 **A. Ground One**

10 In Ground One of the federal habeas petition, petitioner alleges that his right to a voluntary
11 plea was violated and also alleges ineffective assistance of both trial and appellate counsel. (Docket
12 #4, Petition, at p. 3). Petitioner alleges that trial counsel failed to investigate facts, interview
13 witnesses, advise petitioner, and prepare for trial. (*Id.*). Petitioner alleges that trial counsel provided
14 alibi information to the district attorney, who then maliciously changed the dates in the criminal
15 information. (*Id.*). Petitioner alleges that appellate counsel failed to raise any constitutional grounds
16 except a "weak claim." (*Id.*).

17 Ineffective assistance of counsel claims are governed by the two-part test announced in
18 *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the Supreme Court held that a
19 petitioner claiming ineffective assistance of counsel has the burden of demonstrating that (1) the
20 attorney made errors so serious that he or she was not functioning as the "counsel" guaranteed by the
21 Sixth Amendment, and (2) that the deficient performance prejudiced the defense. *Williams v.*
22 *Taylor*, 529 U.S. 362, 390-391 (2000) (citing *Strickland*, 466 U.S. at 687). To establish
23 ineffectiveness, the defendant must show that counsel's representation fell below an objective
24 standard of reasonableness. *Id.* To establish prejudice, the defendant must show that there is a
25 reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding
26 would have been different. *Id.* A reasonable probability is "probability sufficient to undermine
27 confidence in the outcome." *Id.* Additionally, any review of the attorney's performance must be

1 “highly deferential” and must adopt counsel’s perspective at the time of the challenged conduct, in
2 order to avoid the distorting effects of hindsight. *Strickland*, 466 U.S. at 689. It is the petitioner’s
3 burden to overcome the presumption that counsel’s actions might be considered sound trial strategy.
4 *Id.*

5 Ineffective assistance of counsel under *Strickland* requires a showing of deficient
6 performance of counsel resulting in prejudice, “with performance being measured against an
7 ‘objective standard of reasonableness,’ . . . ‘under prevailing professional norms.’” *Rompilla v.*
8 *Beard*, 545 U.S. 374, 380 (2005) (quotations omitted). If the state court has already rejected an
9 ineffective assistance claim, a federal habeas court may only grant relief if that decision was contrary
10 to, or an unreasonable application of the *Strickland* standard. *See Yarborough v. Gentry*, 540 U.S. 1,
11 5 (2003). There is a strong presumption that counsel’s conduct falls within the wide range of
12 reasonable professional assistance. *Id.*

13 Petitioner presented the claims in Ground One to the state courts in his state habeas petition.
14 (Exhibit 16). The Nevada Supreme Court ruled on these claims on the merits, as follows:

15 First, appellant claimed that his trial counsel failed to investigate facts,
16 interview witnesses, advise appellant of the defense strategy and
17 prepare for trial. Appellant failed to set forth what facts were not
18 investigated, what witnesses should have been interviewed, what
19 defense strategies should have been discussed and what further
20 preparations should have been conducted or how further investigation
21 and preparation would have altered his decision to enter a guilty plea.
22 Thus, the district court did not err in denying these claims as appellant
23 has failed to demonstrate that his trial counsel’s performance was
24 deficient or that he was prejudiced.

25 Second, appellant claimed that his trial counsel informed the district
26 attorney of his alibi for the dates set forth in the criminal complaint
27 and that this information allowed the district attorney to alter the dates
28 at the preliminary hearing. Appellant claimed that he was actually
innocent and that his attorney failed to adequately investigate his claim
of innocence. Appellant failed to demonstrate that his trial counsel’s
performance was deficient or that he was prejudiced. Appellant’s
claim that his trial counsel informed the district attorney about his alibi
is based on mere speculation without any support in the record on
appeal. The record reveals that the district attorney moved to amend
the time span in the criminal complaint to correspond with the
testimony of the victim at the preliminary hearing. Appellant failed to
indicate what further investigation should have been performed in this
regard and how this investigation would have altered his decision to

1 enter a guilty plea. Appellant's Alford plea signified that he
2 maintained his innocence, but that he believed it was in his best
3 interests to enter a plea. Appellant received substantial benefit by
4 entry of his guilty plea in the instant case. Appellant was originally
5 charged with five counts of sexual assault on a minor under the age of
6 fourteen and four counts of lewdness with a minor under the age of
7 fourteen. A conviction on the original charges may have resulted in
the imposition of multiple life sentences. However, appellant entered
into negotiations whereby he stipulated to sentences of five to twenty
years on each of the sexual assault counts and the parties were free to
argue on the attempted assault count. Appellant's potential liability
was significantly reduced by his guilty plea. Therefore, we conclude
that the district court did not err in denying this claim.

8 (Exhibit 20, at pp. 2-4). After ruling that trial counsel was not ineffective under the *Strickland*
9 standard, the Nevada Supreme Court went on to rule that appellate counsel was not ineffective:

10 Appellant claimed that his appellate counsel was ineffective for failing
11 to raise constitutional grounds on appeal, failing to remove herself
12 from the appeal and for arguing only one frivolous ground on appeal.
13 Appellant failed to demonstrate that his appellate counsel's
14 performance was deficient or that he was prejudiced. Appellant failed
15 to identify the grounds that he believed should have been raised on
direct appeal or demonstrate that such grounds would have had a
reasonable probability of altering the outcome on appeal. Appellant
failed to demonstrate that appellate counsel should have been
removed. Therefore, we conclude that the district court did not err in
denying the claim.

16 (Exhibit 20, at p. 6). The factual findings of the state court are presumed correct. 28 U.S.C. §
17 2254(e)(1). Petitioner has failed to meet his burden of proving that the state court's ruling was
18 contrary to, or involved an unreasonable application of, clearly established federal law, as
19 determined by the United States Supreme Court, or that the ruling was based on an unreasonable
20 determination of the facts in light of the evidence presented in the state court proceeding. This Court
21 will deny habeas relief as to Ground One.

22 **B. Ground Two**

23 In Ground Two, petitioner alleges his right to the "defense of actual innocence" was violated,
24 claiming that his counsel provided alibi information to the district attorney, who then maliciously
25 changed the dates in the criminal information. (Docket #4, Petition, at p. 5). This ground was
26 addressed by the Nevada Supreme Court, as follows:

Appellant's claim that his trial counsel informed the district attorney about his alibi is based on mere speculation without any support in the record on appeal. The record reveals that the district attorney moved to amend the time span in the criminal complaint to correspond with the testimony of the victim at the preliminary hearing.

(Exhibit 20, at p. 3). The factual findings of the state court are presumed correct. 28 U.S.C. § 2254(e)(1). Petitioner has failed to meet his burden of proving that the state court's ruling was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court, or that the ruling was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. This Court will deny habeas relief as to Ground Two.

C. Ground Three

In Ground Three, petitioner alleges that the sentencing structure promised to him by counsel did not come to fruition. Petitioner further alleges that he sent a motion to withdraw his plea and the court clerk did not file the motion, but forwarded it to counsel, who also failed to file the motion. (Docket #4, Petition, at p. 7). As to the claim that the sentence rendered was not what was promised to him, the Nevada Supreme Court ruled that:

Appellant failed to indicate what alleged promised plea term was omitted from the plea agreement. The totality of circumstances reveals that appellant was made aware of the consequences of his plea. The written guilty plea agreement correctly informed appellant of the negotiations, the potential penalties he faced and the constitutional rights that he waived by entry of his guilty plea. The district court further personally canvassed appellant about his understanding of the negotiations and the consequences of his guilty plea. The State provided a factual basis for this plea, and the appellant affirmatively indicated that he was entering his plea because it was in his best interests. Therefore, we conclude that the district court did not err in denying the claim.

(Exhibit 20, at pp. 7-8). As to petitioner's claim that his trial counsel failed to file a motion to withdraw the guilty plea, the Nevada Supreme Court ruled as follows:

Fourth, appellant claimed that his trial counsel was ineffective for failing to file a presentence motion to withdraw a guilty plea. Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. Appellant failed to set forth the grounds of the presentence motion and demonstrate that such a motion

1 would have provided a reason that was fair and just to permit
2 withdrawal of the guilty plea. Therefore, we conclude that the district
court did not err in denying this claim.

3 (Exhibit 20, at pp. 4-5). The factual findings of the state court are presumed correct. 28 U.S.C. §
4 2254(e)(1). Petitioner has failed to meet his burden of proving that the state court's ruling was
5 contrary to, or involved an unreasonable application of, clearly established federal law, as
6 determined by the United States Supreme Court, or that the ruling was based on an unreasonable
7 determination of the facts in light of the evidence presented in the state court proceeding. This Court
8 will deny habeas relief as to Ground Three.

9 **D. Ground Four**

10 In Ground Four, petitioner alleges that neither counsel nor the court advised him of the "true
11 consequences of lifetime supervision." (Docket #4, Petition, at p. 7). The Nevada Supreme Court
12 addressed this claim as set forth below:

13 Fifth, appellant claimed that his trial counsel was ineffective for failing
14 to inform him about the precise conditions that could be imposed in
the special sentence of lifetime supervision. Appellant failed to
15 demonstrate that his trial counsel's performance was deficient or that
he was prejudiced. The particular conditions of lifetime supervision
16 are tailored to each individual case and, notably, are not determined
until after a hearing is conducted just prior to the expiration of the sex
17 offender's completion of a term of parole or probation, or release from
custody. Thus, all that is constitutionally required is that the totality of
18 circumstances demonstrate that a petitioner was aware that he would
be subject to the consequence of lifetime supervision before entry of
19 the plea and not the precise conditions of lifetime supervision. Here,
appellant was informed in the written guilty plea agreement and in the
20 guilty plea canvass that he was subject to the special sentence of
lifetime supervision. Therefore, we conclude that the district court did
21 not err in denying this claim.

22 (Exhibit 20, at pp. 5-6). The factual findings of the state court are presumed correct. 28 U.S.C. §
23 2254(e)(1). Petitioner has failed to meet his burden of proving that the state court's ruling was
24 contrary to, or involved an unreasonable application of, clearly established federal law, as
25 determined by the United States Supreme Court, or that the ruling was based on an unreasonable
26 determination of the facts in light of the evidence presented in the state court proceeding. This Court
27 will deny habeas relief as to Ground Four.

IV. Certificate of Appealability

In order to proceed with his appeal, petitioner must receive a certificate of appealability. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9th Cir. R. 22-1; *Allen v. Ornoski*, 435 F.3d 946, 950-951 (9th Cir. 2006); *see also United States v. Mikels*, 236 F.3d 550, 551-52 (9th Cir. 2001). Generally, a petitioner must make “a substantial showing of the denial of a constitutional right” to warrant a certificate of appealability. *Id.*; 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). “The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.” *Id.* (*quoting Slack*, 529 U.S. at 484). In order to meet this threshold inquiry, the petitioner has the burden of demonstrating that the issues are debatable among jurists of reason; that a court could resolve the issues differently; or that the questions are adequate to deserve encouragement to proceed further. *Id.*

Pursuant to the December 1, 2009 amendment to Rule 11 of the Rules Governing Section 2254 and 2255 Cases, district courts are required to rule on the certificate of appealability in the order disposing of a proceeding adversely to the petitioner or movant, rather than waiting for a notice of appeal and request for certificate of appealability to be filed. Rule 11(a). This Court has considered the issues raised by petitioner, with respect to whether they satisfy the standard for issuance of a certificate of appealability, and determines that none meet that standard. The Court will therefore deny petitioner a certificate of appealability.

V. Conclusion

IT IS THEREFORE ORDERED that the petition for a writ of habeas corpus is **DENIED IN ITS ENTIRETY.**

IT IS FURTHER ORDERED that petitioner is **DENIED A CERTIFICATE OF APPEALABILITY.**

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1 **IT IS FURTHER ORDERED** that the Clerk **SHALL ENTER JUDGMENT**
2 **ACCORDINGLY.**

3 DATED this 22nd day of December, 2009.



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LARRY R. HICKS
UNITED STATES DISTRICT JUDGE